

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 18, 2019, as he no longer had residuals or disability causally related to his accepted September 22, 2008 employment injury; and (2) whether appellant has met his burden of proof to establish continuing residuals or disability causally related to his accepted employment injury on or after August 18, 2019.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 22, 2008 appellant, then a 49-year-old temporary database management specialist, filed a traumatic injury claim (Form CA-1) alleging that on that date he scraped his right knee when he tripped over petition footing. He stopped work that day. OWCP accepted the claim for a right leg abrasion or friction burn, and subsequently expanded the acceptance of the claim to include a lumbar sprain.⁴ It paid appellant wage-loss compensation on the supplemental rolls as of September 23, 2008 and on the periodic rolls as of March 15, 2009. By decision dated January 12, 2010, OWCP finalized the termination of his wage-loss compensation, effective February 14, 2010, finding that the weight of the medical and factual evidence established that his accepted employment injuries no longer precluded him from performing the duties of his date-of-injury position. By decision dated June 22, 2010, OWCP's hearing representative affirmed the January 12, 2010 decision, terminating appellant's wage-loss compensation. On August 5, 2010 appellant, through counsel, appealed to the Board. By decision dated May 13, 2011, the Board found that OWCP had not met its burden of proof to terminate appellant's compensation benefits, effective February 14, 2010.⁵

Following the Board's decision, OWCP paid appellant wage-loss compensation on the supplemental rolls from February 14, 2010 through July 2, 2011 and on the periodic rolls beginning July 3, 2011.

Appellant came under the care of Dr. Morteza Shamsnia, a Board-certified neurologist, who provided progress reports from April 1, 2010. In a May 17, 2017 progress report, Dr. Shamsnia related appellant's continued complaints since 2010 of low back pain and paresthesia into the left lower extremity. He reported an impression of lumbosacral and cervical radiculopathy, and neuropathy and related that appellant was totally disabled from work.

On August 18, 2017 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record and list of questions, to Dr. Simon Finger, a Board-certified orthopedic

³ Docket No. 10-2039 (issued May 13, 2011).

⁴ Appellant was terminated from the employing establishment effective September 22, 2008.

⁵ *Supra* note 3.

surgeon, for a second opinion examination to determine the current status of appellant's accepted conditions. In a September 19, 2017 report, Dr. Finger noted his review of appellant's medical records and the SOAF, and provided physical examination findings. He diagnosed radiculitis as a residual of appellant's employment injury and noted that the objective findings were consistent with radiculitis and nerve conduction velocity studies demonstrated L5-S1 radiculopathies. Dr. Finger further opined that the physical examination was inconsistent and, therefore, does not provide objective evidence for the claimant's injury. He opined that appellant's knee sprain had resolved with no residuals and concluded that appellant was capable of working with restrictions in a sedentary position.

In a May 2, 2018 report, Dr. Shamsnia diagnosed low back pain, cervical and lumbosacral radiculopathies, bilateral tibial neuropathy, left peroneal nerve neuropathy, and periodic limb movement disorder. He reported that appellant was seen in a follow-up visit for low back and right leg pain, and right lower extremity paresthesia. With regard to the history of the present injury, Dr. Shamsnia noted that appellant was status post a work injury wherein appellant sustained a low back and knee injury and that he had been involved in an October 2013 motor vehicle accident during which his vehicle was rear-ended. He opined that appellant would remain in a no-work status until further notice.

On January 8, 2019 OWCP determined that a conflict in medical opinion existed between Dr. Shamsnia, appellant's treating physician, and Dr. Finger, OWCP's referral physician, with respect to his employment-related conditions and his disability status. It referred appellant to Dr. Christopher E. Cenac, Sr., a Board-certified orthopedic surgeon, together with a list of questions, medical record, and a SOAF, to resolve the conflict in medical opinion evidence.⁶

On April 15, 2019 OWCP received an August 3, 2019 report from Dr. Shamsnia wherein he reiterated his prior findings. Dr. Shamsnia again diagnosed low back pain, cervical and lumbosacral radiculopathies, bilateral tibial neuropathy, left peroneal nerve neuropathy, and periodic limb movement disorder. He reported that appellant was seen in a follow-up visit for low back and right leg pain, and right lower extremity paresthesia. Under history of present injury, Dr. Shamsnia noted that appellant was status post work injury where he sustained a low back and knee injury and in an October 2013 motor vehicle accident.

OWCP subsequently received a report dated February 14, 2019, wherein Dr. Cenac described the September 22, 2008 employment injury, noted that appellant was involved in an October 2013 nonemployment-related motor vehicle accident. Dr. Cenac also noted that OWCP had an accepted lumbar sprain and right knee abrasion. He reviewed appellant's medical records and noted that x-ray interpretations showed bilateral knee symmetrical mild medial joint space loss and no evidence of spondylosis or traumatic lumbar injury. Upon physical examination, Dr. Cenac reported low back discomfort with left straight leg raising while seated, no low back pain with right leg testing, no evidence of sciatica, no sensory deficits, normal bilateral knee and ankle reflexes, full flexion, but extension was limited by appellant's obesity, mild right knee crepitation, and no tenderness or instability in either knee joint. He diagnosed "lumbar contusion and contusion right knee, resolved." This patient has no evidence of residual to the lumbar spine or

⁶ The most recent SOAF was dated August 31, 2012 and related that OWCP had accepted the conditions of lumbar region sprain and right knee abrasion due to the accepted September 22, 2008 employment injury.

right knee” due to the accepted September 22, 2008 employment injury. Regarding appellant’s disability status, Dr. Cenac related that appellant had no work restrictions due to the accepted September 22, 2008 employment injury and, more probably than not, that appellant could return to his date-of-injury position.

By notices dated May 8 and 21, 2019, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on Dr. Cenac’s February 14, 2019 impartial medical opinion that the accepted conditions had ceased without residuals. It afforded him 30 days to submit additional evidence or argument challenging the proposed action.

By decision dated August 2, 2019, OWCP finalized the proposed notices of termination of appellant’s wage-loss compensation and medical benefits, effective August 18, 2019. It found that Dr. Cenac’s February 14, 2019 impartial medical report represented the special weight of the medical evidence and established that appellant no longer had any disability or residuals due to his accepted work-related conditions.

On August 20, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

OWCP subsequently received an August 6, 2019 attending physician’s report (Form CA-20), wherein Dr. Shamsnia diagnosed low back pain, lumbosacral radiculopathy, bilateral posterior tibial neuropathy, and left peroneal nerve neuropathy. Dr. Cenac indicated by check mark “Yes” that appellant’s condition was caused or aggravated by appellant’s accepted employment injury and that his conditions were permanent in nature.

Appellant also submitted reports dated August 3 and November 6, 2018, and May 14, August 8, and November 5, 2019 from Dr. Shamsnia, reiterating the diagnoses and findings from his prior reports.

A hearing was held on December 11, 2019.

By decision dated January 31, 2020, OWCP’s hearing representative affirmed the August 2, 2019 termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee’s benefits.⁷ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment

⁷ *J.T.*, Docket No. 19-1723 (issued August 24, 2020); *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

injury.⁸ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁰ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.¹¹

Section 8123(a) of FECA¹² provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, the Secretary shall appoint a third physician, known as a referee physician or impartial medical examiner (IME), who shall make an examination.¹³ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴ Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 18, 2019.

Appellant's attending physician, Dr. Shamsnia, opined that appellant was totally disabled from work and had ongoing residuals. OWCP referred appellant for a second opinion with Dr. Finger who opined that appellant had no residuals of his employment injury and could perform sedentary work duties. Due to the conflict between Dr. Shamsnia and Dr. Finger, it properly

⁸ See *S.P., id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989).

⁹ *S.P., supra* note 7; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *S.P., supra* note 7; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

¹¹ *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹² *Supra* note 2 at § 8123(a)

¹³ *Id.*; *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ *D.G., supra* note 11; *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

referred appellant for an impartial medical examination with Dr. Cenac to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

In a February 14, 2019 report, Dr. Cenac noted that he had reviewed the SOAF and the medical record and opined that appellant had no residuals of the accepted September 22, 2008 employment condition, that appellant had no work restrictions, and more probably than not could return to the date-of-injury position. He concluded that appellant had resolved right knee contusion and lumbar contusion. Based on this report, OWCP terminated appellant's wage-loss compensation and medical benefits, effective August 18, 2019.

The Board finds, however, that Dr. Cenac's report is not entitled to the special weight of the medical evidence accorded an IME as it is not based on an accurate factual background. Dr. Cenac acknowledged that the SOAF provided by OWCP indicated that it had accepted appellant's September 22, 2018 traumatic injury claim for right leg abrasion and lumbar sprain. However, he did not follow that acceptance in rendering his medical opinion. Instead, Dr. Cenac related that appellant had resolved "right knee and lumbar contusions."

The Board has long held that the report of an IME who disregards a critical element of the SOAF is defective and insufficient to resolve the existing conflict of medical opinion evidence.¹⁶ The Board finds that Dr. Cenac's report is, therefore, not entitled to the special weight as an IME and is insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 18, 2019.¹⁷

¹⁶ See *W.F.*, Docket No. 18-0653 (issued September 26, 2019); *B.B.*, Docket No. 18-1121 (issued January 8, 2019); *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

¹⁷ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 23, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board